SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
OCT 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6031

M. C. MANUFACTURING COMPANY, INC. and
UNIVERSAL AUTOMATIC MACHINES, INC.
Petitioners
vs.
TEXAS FOUNDRIES, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, 9TH SUPREME JUDICIAL DISTRICT

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M. C. MANUFACTURING COMPANY, INC. and
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vs.

TEXAS FOUNDRIES, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, 9TH SUPREME JUDICIAL DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals of Texas, Beaumont, entered in the above-entitled case on January 30, 1975.

CITATIONS TO OPINIONS BELOW

The holding of the District Court, Angelina County, is unreported, but the judgment of that Court is printed in Appendix A hereto, *infra*, p. 1. The opinion of the Court of Civil Appeals of Texas, Beaumont is reported in 519 S.W. 2d 269. The Supreme Court of Texas refused writ of error on June 11, 1975.

JURISDICTION

The judgment of the District Court, Angelina County, was entered on August 28, 1974. The judgment of the Court of Civil Appeals of Texas, Beaumont, was entered on January 30, 1975. The Supreme Court of Texas refused writ of error on June 11, 1975 and overruled motion for rehearing on July 9, 1975. The mandate of the Court of Civil Appeals issued on July 23, 1975.

HOW FEDERAL QUESTIONS PRESENTED

The contention that the Texas District Court lacked authority to hear Respondent's cause of action which had been barred by a judgment entered by the United States District Court for the Eastern District of Texas, Marshall Division, on the 31st day of January, 1974 in Civil Action No. 1614 on the docket of said Court styled *M. C. Manufacturing Company, Inc. and Universal Automatic Machine Company, Inc. v. Texas Foundries, Inc. and H. R. Products, Inc.* was first raised by the Petitioners by their Plea in Bar filed May 2, 1974 in the District Court of Angelina County, Texas. Petitioner's contended by said Plea that the subject matter of the case at Bar was that of a compulsory conterclaim and that by virtue of the provisions of Rule 13 of the Federal Rules of Civil Procedure relating to compulsory conterclaims the cause of action asserted by Texas Foundries, Inc. in the case at Bar against M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc. was permanently and forever barred. The questions were presented to the Court of Civil Appeals, Beaumont, by appeal. The Petition is for a Writ of Certiorari addressed to the Court of Civil Appeals of Texas, Beaumont, because the Supreme Court of Texas refused writ of error.

QUESTIONS PRESENTED

Whether the provisions of Rule 13 of the Federal Rules of Civil Procedure prohibit the subject matter of a compulsory counterclaim from being adjudicated in a State Court after judgment has been rendered by the Federal District Court, and whether Rule 13 bars recovery on the subject matter of a compulsory counterclaim not raised in the Federal Court.

STATUTE INVOLVED

The statutory provision involved is Rule 13 (a) of the Federal Rules of Civil Procedure which reads as follows:

Compulsory Counterclaims - A pleading shall state as a counterclaim any claim which at the time of serving the pleader has against any opposing party, if it arises out of the transaction or occurance that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

STATEMENT

Petitioners filed an Anti-trust action against Respondent in the United States District Court for the Eastern District of Texas, Marshall Division. Petitioners secured Service of Process and Respondent answered. Respondent filed its State Court suit against Petitioners. Petitioners proceeded to judgment in the Federal Court action against Respondent on January 31, 1974. At no time in the Federal Court proceeding did Respondent plead, raise, allude to, or bring forth its compulsory counterclaim against Petitioners. Respondent proceeded to the judgment below on August 28, 1974, against Petitioners' Pleas In Bar and Abatement. Respondent appealed the judgment of the United States District Court of Appeals, Fifth Circuit. The United States Court of Appeals reversed the judgment of the United States District Court and Petitioners filed Motion for Rehearing. The United States Court of Appeals has ordered Respondent to reply to said Motion.

From the judgment of the District Court of Angelina County, Texas, timely appeal was taken to the Texas Court of Civil Appeals, Beaumont. The Court of Civil Appeals affirmed the judgment below in its opinion of January 30, 1975. (Appendix A).

The Court of Civil Appeals admitted this to be a case of

first impression. The only guidelines available to that Court were the numerous cases relative to attempts made at securing an order enjoining the prosecution of the State Court Case, rather than a Plea In Bar. The Court took the position that it saw no reason why the same rules should not be applied to both types of cases. The Court of Civil Appeals admitted, however, that, even though Federal Courts lack authority to enjoin State Court actions involving claims arising out of a transaction already involved in a Federal Court case, that a State Court may only proceed with the litigation until judgment is obtained in the Federal Court which may be set up as *res adjudicata.* However, since the judgment of the United States District Court was on appeal, the Court of Civil Appeals refused to view the judgment as a "final" judgment for the purposes of Rule 13 barring further litigation of the same subject matter. The Court relied its decision on *Fantecchi v Gross,* 158 F. Supp. 684 (E.D. Pa. 1957), in that Rule 13 (a) did not give the Federal Courts the authority to *enjoin* State Court actions involving claims arising out of a transaction already involved in a Federal Court case. The Court declined to undertake the question of whether or not the same result would be reached had the Federal Court judgment been entered and a Plea in Bar raised in the State Court.

REASONS FOR GRANTING THE WRIT

The action of the District Court and its affirmance by the Court of Civil Appeals nullified the intended effect of Rule 13 (a) of the *Federal Rules of Civil Procedure.* The Federal Rule is more than a mere housekeeping rule to expedite the Court's business. It is a substantive rule of law requiring an opposing party to bring forth a compulsory counterclaim or lose forever that cause of action. The rule defines the scope of the casue of action to which *res adjudicata* will apply and presents an estoppel against the party who fails to comply with

it, thus barring the action no matter where it is brought. For this reason several State Courts have properly held a claim barred for failure to plead it as a counterclaim in a federal action. Among these are Pennsylvania, Ohio, Tennessee, California and North Carolina. [1]

The question thus arises as to whether a State Court will be permitted to ignore the substantive impact of the *Federal Rules of Civil Procedure* and the Federal Decisions pertaining thereto. This honorable Court should settle the question as to whether or not the *Federal Rules of Civil Procedure,* in particular Rule 13 (a), is merely a housekeeping rule to expedite the Court's business and thus has no effect whatsoever outside the confines of the particular Federal Court in which the cause of action may be pending, or whether it is truly a substantive rule of law to be followed and upheld by other Courts. Of necessity it becomes necessary to determine at what time a judgment becomes final for the purposes of interjecting a new cause of action. For this purpose, the judgment is final upon entry. Of course, it may be appealed, but a compulsory counterclaim cannot later be asserted during some stage of the appeal process. During appeal, the Judgment may not be modified by either party or by the Trial Judge. It may not be set aside by the Trial Judge on his own Motion. It matters not that the Judgment may be the subject of an Appeal. No new issues and no new counterclaim may be asserted on appeal. The Texas Court of Civil Appeals relied upon *Fantecchi v Gross, supra* for the reasoning the Federal Courts lacked the authority to enjoin State Court actions involving claims arising out of a transaction already involved in a Federal Court case (See Opinion p.4). However, *Fantecchi* dealt primarily with injunctive relief, and failed to resolve the question as to whether or not a defendant would be barred from pleading a compulsory counterclaim in a State Forum on the ground that it is

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[1] Wright, *Law of Federal Courts,* Sec. 79 (1970).

res judicata. The Court in *Fantecchi* said:

> . . .Insofar as the effect of a party's failure to plead a compulsory counterclaim under said Rule and a Federal action is concerned the Congressional intent is clear - said party is thereafter barred from pleading same on the ground that it is res judicata. However, insofar as the effect of such failure on a State Court action is concerned the Congressional intent is not so clear; thus, in Rule 13 (a) we are unwilling to say that Congress, in adopting said Rule, intended to grant Federal Courts the authority to enjoin State Court actions . . . . (158 F. Supp. at 678).

Thus *Fantecchi,* even though denying a federal injunction to prohibit State Court litigation, does hold that a party is thereafter barred from pleading the compulsory counterclaim.

But is it even necessary to determine whether or not the Federal Court Judgment had become final? It would appear not in light of *National Equipment Rental, Ltd. v Fowler,* 287 F. 2d 43 (2nd Cir. 1961). In *National Equipment* the Plaintiff, National Equipment Rental, Ltd. (National) brought action against A. L. Fowler and other in the U. S. District Court for the Eastern District of New York alleging the Defendant had defaulted in the payment of monthly rentals proved for in a written lease of ice-making equipment. Service was perfected upon the Defendant, who appeared generally. Issue was joined on December 8, 1958, when the Defendant filed an answer denying the material allegations of the complaint. A notice and order for a pretrial conference to be held on May 20, 1959 was mailed to all attorneys on March 12, 1959. On April 27, 1959, after receipt of this pre-trial conference order, one of the Defendants commenced an action against the Plaintiff, based upon the same lease agreement, in the U. S. District Court for the Northern District of Alabama, alleging National's breach of the terms of the lease and fraud

in its inducement. Service was perfected upon National. National moved to quash the service but this motion was denied. National then moved the Alabama Federal Court to stay prosecution and for a transfer of the case to the Eastern District of New York where the prior action was pending. This Motion was denied. Thereafter, on January 25, 1960, National moved in its 1958 case in the Eastern District of New York for an order to enjoin the Defendant from proceeding further in the Federal Court action in Alabama and to transfer the second commenced Alabama action to the Eastern District of New York. The New York Federal District Judge granted the Motion in all respects. The Defendant appealed.

The Court of Appeals affirmed that portion of the order that enjoined the Defendant from further prosecuting the Alabama action. The Court stated this to be a sound exercise of judicial discretion. (287 Fed. 2d at 45). The Court reasoned that the second cause of action arose from the same transaction of lease and was pleadable in the New York action as a compulsory counterclaim under Rule 13 (a). The Court stated that the penalty for failure to assert a compulsory counterclaim is the preclusion of a later assertion of that Claim. The purpose of the compulsory counterclaim devise being to bring all logically related Claims into a single litigation, thereby avoiding the multiplicity of suits. The Court wisely held that "Sound judicial discretion dictates that the second court decline its consideration of the action before it until the prior action before the first court is terminated. (citing cases.") (287 Fed. 2d at 45). The Court reasoned further:

. . .As Judge Parkinson said in Martin v Graybar Electric Co., supra, 266 F. 2d at page 204:

> "Two simultaneously pending lawsuits involving identical issues and between the same parties, the parties being transposed and each prosecuting the other independently, is certainly anything but

> conducive to the orderly administration of justice. We believe it to be important that their be a single determination of a controversy between the same litigants and, therefore, a party who first brings an issue into a Court of competent jurisdicition should be free from the vexation of concurrent litigation over the same subject matter, and an injunction should issue enjoining the prosecution of the second suit to prevent the economic waste involved in duplicating litigation which would have an adverse effect on the prompt and efficient administration of justice unless unusual circumstances warrant."

Thus there is really no necessity for the finding of a final judgment in the prior litigation. Certainly *National Equipment* did not require a final judgment, indeed the prior case had not even been tried. But the Court did see fit to enjoin the Defendent from prosecuting his compulsory counterclaim in another Federal District Court in another state. Surely it follows that if a Defendant may be enjoined by a Federal District Court in one state from litigating in a Federal District Court of another state on the theory that the penalty for failure to assert a compulsory counterclaim is a preclusion of a later assertion of that claim, then certainly such a Defendant would be barred from asserting his claim in a State District Court. To hold otherwise would result in State Courts having the power to ignore that vast body of law pertaining to such suits being barred for failure to assert a compulsory counterclaim when at the same time a Federal Court would be bound to uphold it. State Courts should not be free to do that which Federal Courts are not free to do. To hold otherwise would only serve to diminish the stature and authority of our federal jurisprudence.

In the case at Bar, Texas Foundries, Inc., was not at liberty to select a different forum for its compulsory counterclaim. If it chose not to assert it in the Federal Court

action, it was therefore penalized. The penalty for failure to assert a compulsory counterclaim is that if the action proceeds to judgment without the interposition of a counterclaim, the counterclaim is barred. *(Notes of Advisory Committee on Rules,* Rule 13, Note 7). Thus there is a *penalty* attached to the failure to raise such counterclaim. The *penalty* is enforced by barring said Claim. No court, especially an inferior State Court, is free to ignore the intent of Congress.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. The state of the law should be made known as to whether litigants in the Federal System of Jurisprudence will be free to rely upon their Judgment obtained in Federal Court as the final outcome to their controversy or forced to stand and wait for the other shoe to fall in State Court.

Respectfully submitted,

Don Stokes

Don Stokes
P. O. Box 547
Marshall, Texas 75670

Counsel for Petitioners

October 16, 1975

CERTIFICATE OF SERVICE

I hereby certify that on October ~~17~~ 26, 1975 there was served upon Zelesky, Corneluis, Rogers, Berry & Hallmark, Attorneys for Respondent, P. O. Drawer 1728, Lufkin, Texas, 75901, by duly addressed United States mail, postage prepaid, a copy of the attached Petition For Writ of Certiorari.

Don Stokes

Of Counsel

APPENDIX A

IN THE DISTRICT COURT OF ANGELINA COUNTY STATE OF TEXAS

TEXAS FOUNDRIES, INC. X

VS. X

NO. 14,816-72-5

M. C. MANUFACTURING X
COMPANY, INC., ET AL X

JUDGMENT OF THE COURT

Came on to be heard on the 2nd day of August, 1974, the above styled and numbered cause, wherein Texas Foundries, Inc. is plaintiff and M. C. Manufacturing Company, Inc., and Universal Automatic Machines, Inc., are the remaining defendants in said cause, inasmuch as the defendant, the First National Bank of Marshall, Texas, has heretofore filed its plea of privilege and such plea of privilege has been sustained and the cause of action asserted by the plaintiff, Texas Foundries, Inc. against the defendant, the First National Bank of Marshall, Texas, has been severed from this cause and transferred to the District Court of Harrison County, Texas, and both the plaintiff, Texas Foundries, Inc. and the defendants, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc. announced ready upon the plea in bar filed by the said two defendants and the Court having heard evidence in regard to the plea in bar of said defendants and having heard the statements and arguments of counsel thereon is of the opinion that the plea in bar filed by the defendants M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc. should be and is in all things overruled.

It is accordingly ORDERED, ADJUDGED and DECREED that the plea in bar of the two defendants remaining in this cause, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc. is in all things overruled.

Thereafter, the plaintiff, Texas Foundries, Inc., and the defendants, M. C. Manufacturing Company, Inc., and Unviersal Automatic Machines, Inc. by and through their respective attorneys of record announced ready for trial on the merits. It appearing to the Court that the suit herein is a suit by the plaintiff against the defendants on a sworn account, and the Court having heard evidence with respect to said sworn account and the arguments and statements of counsel with respect thereto is of the opinion that the account is just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed and that the plaintiff should have and recover of and from the defendants, jointly and severally, the amount of such account in the sum and amount of Sixty Thousand Eight Hundred Ninety-Five and 82/100 ($60,895.82) Dollars.

It further appearing to the Court that due demand for the payment of such account was made on April 7, 1972 and that such account has not been paid and that interest on said account from and after January 1, 1973 amounts to the sum and amount of *Six thousand fifty eight and 79/100 ($6,058.79)* Dollars.

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Texas Foundries, Inc. have judgment of and from the defendants, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc., jointly and severally, for the sum and amount of $60,895.82 and in addition thereto, interest in the sum and amount of *$6,058.79* or for the total sum and amount of *$66,954.61.*

It further appearing to the Court that due demand was made for the payment of such account on April 7, 1973 and that no payment was made on such sworn account, it became necessary for the plaintiff, Texas Foundries, Inc., to hire the

firm of Zeleskey, Cornelius, Rogers, Berry & Hallmark to collect such account and that by reason thereof and the refusal of the defendants to pay such account that Texas Foundries, Inc. has incurred attorneys' fees in the sum and amount of *$6,000.00*, which such fees are reasonable and necessary for such services as were rendered by such attorneys in Angelina County, Texas, and that in addition to the sums hereinabove set forth that the plaintiff should recover of and from the defendants attorneys fees in the sum and amount of *$6,000.00*.

It is accordingly ORDERED, ADJUDGED and DECREED that the plaintiff, Texas Foundries, Inc., do have and recover of and from the defendants, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc., jointly and severally, attorneys fees in the sum and amount of *$6,000.00*, such recovery being in addition to the sums hereinabove set forth in this judgment, which judgment shall bear interest at the rate of six (6%) percent per annum, and that plaintiff have and recover from defendants all costs of Court incurred herein and for which execution shall issue.

To which action of the Court in overruling the defendants, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc., plea in bar, such defendants in open Court duly and timely excepted thereto and gave notice of appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont.

SIGNED AND ENTERED this 28th day of August, 1974.

/s/ David Walker
Judge Presiding

NO. 7660

M. C. MANUFACTURING CO., INC., ET AT — APPELLANTS

V.

TEXAS FOUNDRIES, INC. — APPELLEE

Texas Foundries, Inc., a Texas corporation as plaintiff, brought this action as a sworn account in the State District Court in Angelina County. M. C. Manufacturing Co., Inc., and Universal Automatic Machines, Inc., both Texas corporations, were named as defendants. Trial was before the court and judgment was rendered for plaintiff. The parties will be referred to here as they were in the trial court, or by name.

Defendants' sole point of error here is that the trial court erred in overruling their plea in bar. Points of error as to overruling their plea in abatement were waived on oral argument. The allegations in the plea in bar and the evidence heard by the trial court showed the following: Before this state court case was filed, these defendants had filed a suit in the federal court against Texas Foundries, Inc., and H/R, Inc. That suit was for treble damages under the Sherman, 15 U.S.C.A. §§ 1-7 (1890), and Clayton, 15 U.S.C.A. §§ 12-27 (1914), Anti-Trust Acts. The federal court case was heard first resulting in a judgment for these defendants in the amount of $219,000. That case was pending on appeal in the Fifth Circuit at the time this state court case was tried, and also at the time of oral argument here.

The essence of defendants' contention here is that their suit was filed first, and under FED. R. CIV. P. 13 (a), the sworn account action brought by plaintiff was a compulsory counterclaim, and it had to be filed in the suit then pending in the federal court. The basis for that argument is that the action on the sworn account arose out of the transaction or occurrence that was the subject matter of the federal court action. This point of error is overruled.

We have not been cited nor have we found a case directly in point. Apparently, the approach taken in other cases was to attempt to secure an order enjoining the prosecution of the state court case, rather than a plea in bar. However, we see no reason why the same rules should not be applied to both types of cases.

In Reines Distributors, Inc. v. Admiral Corporation, 182 F. Supp. 226, 229 (S.D.N.Y. 1960), Reines sued Admiral in the federal court alleging violation of the anti-trust laws. Later, Admiral sued Reines in the state court on notes and an open account. Reines then sought an order in the federal court case enjoining Admiral from prosecuting these state court suits, which was denied with these statements of law:

> "We come now to plaintiff's argument based on Rule 13 (a) of the Federal Rules of Civil Procedure. That rule requires the defendant to set forth in his answer any counterclaim which he has against the opposing party 'if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.' In discussing this phase of the question, it must be borne in mind that the respective parties seek judgment strictly *in personam* and it has been held in such situations that:
>
> > " ' * * * both a State Court and a Federal Court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other, ' Penn General Casualty Co. v. Commonwealth of Pennsylvania 1935, 294 U.S. 189, 195, 55 S. Ct. 386, 389, 70 L. Ed. 850."

The Reines case was cited and followed in L. F. Dommerich & Co. v. Bress, 280 F. Supp. 590, 599 (D.N.J. 1968) saying:

"The foregoing rule [13 (a)] is considered by the Federal Courts to be a 'good housekeeping' rule, being procedural, avoiding a multiplicity of actions, where all claims between the opposing parties generally have a logical connection arising out of the same transaction or occurrence. . . . Plaintiff invokes 28 USC § 2283, contending that a stay of the State Court action should issue, where the effect of a state court judgment might tend to defeat or impair the jurisdiction, judgment, or orders of the Federal Court. . . . In determining whether an injunction should issue, we consider it unnecessary to reach the issue, of compulsory or permissive counterclaims. . . . We do determine that where both federal and state courts have concurrent jurisdiction of adverse parties seeking *in personam* judgments, then each may generally proceed with its separate litigation until judgment is rendered in one court which may be interposed affirmatively as *res judicata* in the other."

In Red Top Trucking Corp. v. Seaboard Freight Lines, 35 F. Supp. 740, 742-743 (S.D.N.Y. 1940), the plaintiff had asked the federal court to stay an action in the New York State Court on the ground that it arose out of the transaction involved in the federal court litigation, and that the state court action was filed subsequently. The Court said:

"The plaintiff would have this court construe the above Rule [13 (a)] to mean that, once having secured jurisdiction over a claim of action, whether in rem or in personam, the Federal Court thereby has jurisdiction over all claims which the defendant may have against the plaintiff arising out of the same subject matter.

"It is my belief that this construction is erroneous. (at 724)

* * *

"... [I]t is my feeling that there is no discretion in this court, where the actions involved are in personam, but that it must refuse the injunction." (at 743)

In Fantecci v. Gross, supra, the plaintiff contended that Rule 13 (a) gave the federal courts the authority to enjoin state court actions involving claims arising out of a transaction already involved in a federal court case. The Court held that it was unwilling to say that Congress, in adopting Rule 13 (a), intended to grant federal courts the authority to enjoin state court actions. See also, Sessions Company v. W. A. Scheaffer Pen Company, 344 S.W. 2d 180 (Tex. Civ. App. – Dallas 1961, writ ref'd n.r.e.).

In both the state court and federal court cases, *in personam* judgments are sought, and there is no final judgment in either case; so, the issue as to *res adjudicata* is not before us.

Whether we would reach the same result had the federal court judgment been final when the trial court heard the plea in bar is not presented by this record, and we express no opinion thereon.

Judgment AFFIRMED.

Homer E. Stephenson
Associate Justice

Opinion delivered
January 30, 1975

APPENDIX B

CLERK'S OFFICE-SUPREME COURT

Austin, Texas, July 9, 1975.

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of

No. B-5161

M. C. MFG. CO. VS. TEXAS FOUNDRIES

was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX C

The State of Texas

To the *DISTRICT* Court of *ANGELINA* County, GREETINGS:

Before our Court of Civil Appeals on the *30* day of *January* A.D. *1975* the cause upon appeal to revise and reverse your judgment between

M. C. MANUFACTURING COMPANY, INC., ET AL

No. *7660* and

TEXAS FOUNDRIES, INC.

was determined; and therein our said Court of Civil Appeals made its order in these words:

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, M. C. Manufacturing Co., Inc., et al, and the sureties on his appeal bond, Jim Ammerman and J. Ray Kirkpatrick, pay all costs in this behalf expended; and this decision be certified below for observance.

WHEREFORE WE COMMAND YOU to observe the order of our said Court of Civil Appeals in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness, the Hon. *MARTIN DIES, JR.,* Chief Justice of our said Court of Civil Appeals of the Ninth Supreme Judicial District of Texas, with the Seal

thereof annexed, at the City of Beaumont, this the *23* day of *July* A. D. 19*75*

SEAL

JOE A. HULGAN
Clerk

/s/ By *Joe A. Hulgan*

A TRUE COPY I CERTIFY

SUPREME COURT, U. S.

FILED

NOV 28 1975

MICHAEL RODAK, JR., CLERK

In the Supreme Court Of the United States

OCTOBER TERM, 1975
No. 75-603

M.C. MANUFACTURING COMPANY, INC. and
UNIVERSAL AUTOMATIC MACHINES, INC.
Petitioners

vs.

TEXAS FOUNDRIES, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CIVIL APPEALS OF TEXAS,
9TH SUPREME JUDICIAL DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court Of the United States

OCTOBER TERM, 1975
No. 75-603

M.C. MANUFACTURING COMPANY, INC. and
UNIVERSAL AUTOMATIC MACHINES, INC.
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vs.

TEXAS FOUNDRIES, INC.
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PETITION FOR A WRIT OF CERTIORARI TO THE
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9TH SUPREME JUDICIAL DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

OBJECTION TO JURISDICTION

Respondent asserts that this Court is without jurisdiction to consider this petition by virtue of petitioners' failure to timely file their petition for a writ of certiorari in accordance with Title 28 U.S.C. Section 2101, which requires:

> "(c)...any writ of certiorari intended to bring any judgment or decree in any civil action, suit or proceeding before the Supreme Court for

> review shall be taken or applied for within ninety days after the entry of such judgment or decree."

Rule 506 of the Texas Rules of Civil Procedure makes clear when a judgment of the Supreme Court of Texas is final:

> "The judgment of the Supreme Court shall be final at the expiration of fifteen days from the rendition thereof, when no motion for rehearing has been filed."

It is well established in Texas case law, that the overruling of a motion for rehearing by the Supreme Court of Texas constitutes the entry of a final judgment. *Rittenberry v. Capitol Hotel Co.,* 69 S.W.2d 491 (Tex. Civ. App.-Amarillo, 1934, writ ref'd); *Brown, et al v. Linkenhoger,* 153 S.W.2d 342 (Tex. Civ. App.-El Paso 1941, writ ref'd w.o.m.).

Thus it is clear that the requisite ninety day period is computed from the date of the final judgment and not from the date of the Court of Civil Appeals' "ministerial act" of issuing the mandate which the Supreme Court of Texas had directed. *Department of Banking, State of Nebraska v. Pink,* 317 U.S. 264 (1942).

Since petitioners' motion for rehearing before the Supreme Court of Texas was overruled on July 9, 1975, the ninety day period within which to file its petition for writ of certiorari ended on October 7, 1975. Petitioners, however, did not file their petition in this Court until October 21, 1975, two weeks late.

Petitioners cite the case of *Commissioner of Internal Revenue v. Estate of Edward T. Bedford,* 325 U.S. 283

(1945) to support their position that the ninety day period begins to run from the "order of mandate" rather than the overruling of the motion for rehearing by the Supreme Court of Texas. However, this Court made it quite clear that its holding in the *Bedford* case was an exception to the general rule and applied only to petitions for writ of certiorari from the United States Court of Appeals for the Second Circuit, since in that Circuit only, the "order of mandate" serves the function of an entry of judgment and is not just a "ministerial act."

REASONS FOR DENYING THE WRIT

This case involves no important or novel question of law but only the question whether an action in personam for debt in a Texas State Court is barred by a Federal procedural rule, Rule 13(a) of the Federal Rules of Civil Procedure, where such action may be a compulsory counterclaim to an anti-trust action in Federal Court.

Prior decisions by this Court and other Federal and State Courts have clearly established in regard to Rule 13(a), the Federal Courts will not interfere with state court actions where in personam judgments are sought, *Penn General Casualty Co. v. Commonwealth of Pennsylvania,* 294 U.S. 189 (1935), and that state courts are free to proceed with their separate litigation without reference to the proceedings in any other court. *Sessions Company v. W.A. Sheaffer Pen Company,* 344 S.W.2d 180 (Tex. Civ. App.-Dallas 1961, writ ref'd n.r.e.), *Byrd-Frost, Inc. v. Elder,* 93 F.2d 30 (5th Cir.

1937).

The Court of Civil Appeals of Texas, Ninth Supreme Judicial District, clearly followed the applicable decisions of this Court and other Federal Courts in rendering its opinion in the case now before the Court (Petition, p. A4). In that opinion, the Court of Civil Appeals of Texas followed the case of *Reines Distributors, Inc. v. Admiral Corporation,* 182 F. Supp. 226 (S.D.N.Y. 1960) and quoted from it appropriately. In that case Reines sued Admiral Corporation in Federal Court claiming "alleged illegal price discrimination in violation of the Anti-Trust laws." That is what petitioners alleged in their Federal Court suit against respondent. Subsequently, Admiral Corporation commenced 41 separate actions in New York State Court against Reines on notes and trade acceptances made by Reines to Admiral "and on open account between the parties." This is what respondent did in this suit brought in the State Court on open account between the parties. Reines moved in the State Court for a stay of the counterclaims in Federal Court, but the New York State Courts refused to stay the Federal Court action. (See 182 F. Supp. at 227, citing 9 A.D.2d 410, 194 N.Y.S.2d 932). Reines then moved in Federal Court for an order enjoining Admiral from further prosecuting the State Court suit on the notes and open accounts. The holding in the *Reines* case was that the Federal Court has no power to interfere with the State Court proceedings. Thus, in accordance with the law of comity, both Courts acted as sister courts, and neither would interfere with the other, nor abate its own proceedings.

The *Reines* case was cited and followed in *L.F.*

Dommerich & Company v. Bress, 280 F. Supp. 590 (D.N.J., 1968) which case was also followed and cited by the Court of Civil Appeals of Texas in its opinion (Petition, p. A5). The Court of Civil Appeals also cited the cases of *Red Top Trucking Corporation v. Seaboard Freight Lines,* 35 F. Supp. 740 (S.D.N.Y. 1940) and *Fantecchi v. Gross,* 158 F. Supp. 684 (E.D. Pa 1957). In both of these cases the effect of Rule 13(a) was discussed, and it was held that the Federal Courts will not enjoin a State Court action under these circumstances.

The cases cited and followed by the Court of Civil Appeals of Texas demonstrate that in actions *in personam* a Federal Court will not enjoin the progress of a State Court, and a State Court will not enjoin the progress of a Federal Court, even where the suits involve the very same subject matter. While petitioners in this case are not asking one court to restrain another, they are asking the State Court to bar its own action because an allegedly similar suit is pending in Federal Court. The same reason that prevents restraint of the sister court defeats a plea in abatement or bar. Each court is free to proceed without regard to the other. There is no impediment to prevent proceeding to a decision.

The Court of Civil Appeals of Texas also cited the case of *Sessions Company v. W.A. Sheaffer Pen Co.,* supra, where that Court ruled a plea in abatement, similar to petitioners' plea in bar herein, stating at Page 184 that:

> "Finally, there is no merit to defendant's contention that the State Court should have abated the instant suit pending a trial for treble

damages action pending in the Federal Court. It has long been recognized that the State Court is free to proceed in its own way and in its own time without reference to the proceedings in any other court. 1 Tex. Jur. 2d 37; Byrd-Frost, Inc. v. Elder 5 Cir., 93 F. 2d 30, 115 ALR 342; Bergholm v. Peoria Life Ins. Co., Tex. Civ. App. 1933, 63 S.W.2d 1064."

Thus, the Court of Civil Appeals of Texas clearly applied the applicable decisions of this Court and other Federal Courts in rendering its decision that petitioners' plea in bar should be overruled. The question of law presented herein has long been settled and is not one meriting this Court's attention.

CONCLUSION

For the foregoing reasons the Petition should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on the day of November, 1975, a true copy of the foregoing Brief for Respondent in Opposition was mailed by United States Mail to Mr. Don Stokes, P.O. Box 547, Marshall, Texas 75670, attorney for petitioner.